Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

O P I N I O N

I. Summary

By today's decision, we deny, in part, and grant, in part, the Petition of Metro One Telecommunications, Inc. (Metro One) and InfoNXX, Inc. (InfoNXX) to modify Decision (D.) 98-01-022. The Petitioners seek an order to require that incumbent local exchange carriers (ILECs) offer to provide access to their Directory Assistance (DA) databases to all independent third-party DA service providers under the lowest rates that apply where such access is furnished to any other service provider. In order to ensure that such access is, in fact, nondiscriminatory, petitioners ask that the ILECs be required to immediately file, under Section 252 of the 1996 Telecommunications Act (the "1996 Act"), any agreements, memoranda of understanding, or similar documentation of the prices they charge for DA access by other providers, including their affiliates and competitive local carriers (CLCs.)

By this decision, we deny, in part, the Petition for Modification. Although we do not find sufficient justification to grant the modification sought by Petitioners, we conclude that a more limited modification is warranted to adjust downward the amounts that Pacific Bell (Pacific) is authorized to charge for access to its DA database, as we explain below. We shall therefore modify D.98-01-022 to reflect the more limited modification that we adopt herein, namely, to require Pacific to amend its tariffs to exclude the five-cents-per query charge applicable to its DA database.

II. Background

In D.97-12-042, the Commission ordered the ILECs to furnish independent third-party DA providers, such as Metro One and InfoNXX,[1] with nondiscrimatory access to DA listings. The Commission stated that "access to database listings for DA purposes should be the same for and between all competing providers, including third-party database vendors." Just prior to the issuance of D.97-01-042, the Commission determined in arbitration proceedings under § 252 of the 1996 Act that Pacific and Verizon should provide DA listings to CLCs "at the cost of the transfer media (electronic tape) plus reasonable costs for preparation and shipping of the media."[2] The Commission ordered that "the determination of appropriate cost recovery for the preparation and delivery of

[1] In December 1999, InfoNXX's affiliate, InfoNXX Carrier, Inc., assumed responsibility for acquisition of data necessary for the provision of DA service. As a certificated competitive local carrier, InfoNXX Carrier has obtained such data from Pacific pursuant to an interconnection agreement rather than pursuant to D.97-01-042. Accordingly, InfoNXX's interest at this juncture is simply in obtaining a true-up of amounts paid prior to December 1999.

[2] D.97-01-042, fn. 13.

the information . . . be addressed in the [Open Access Network Architecture and Development] OANAD proceeding.[3]

Following the issuance of D.97-01-042, both InfoNXX and Metro One sought to negotiate interim rates for access for Pacific and Verizon's DA databases. Pacific initially indicated that the rate would be $0.0059 per listing, which InfoNXX and Metro One indicated was acceptable.[4] However, before formal agreements could be established, the Commission allowed Pacific's Directory Assistance Listing Information Service (DALIS) tariff to go into effect, and Pacific thereafter insisted that it would furnish InfoNXX and Metro One with access to DA listings only in accordance with that tariff. The DALIS tariff had been proposed in an advice letter filed before D.97-01-042 was issued and established pricing in excess of the rate that Pacific had promised to InfoNXX and Metro One.

By D.98-01-022, the Commission determined that Pacific's tariff rates should be used on an interim basis, however, subject to true-up, notwithstanding the tariff's differences from the rates that Pacific was charging CLCs for access to the same data. The Commission concluded that this interim arrangement would not constitute undue discrimination because rates included in the interconnection agreements between Pacific, on the one hand, and MCI WorldCom Network Services, Inc. and AT&T Communications of California, Inc., on the other, were "part of an integral package of terms and conditions specifically negotiated by the parties," and [i]t would not be appropriate to

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[3] D.97-01-042, Ordering Paragraph (OP) 8.

[4] Comments of Metro One to OP 9 of D.97-01-042 Concerning Directory Listing Issues, August 15, 1997, at p. 4.

arbitrarily single out one term of such interconnection agreements and apply that term to other competitors that were not bound by the comprehensive terms of any one interconnection contract."[5] Moreover, the Commission concluded that while "the parties have raised valid questions over the reasonableness of the ILEC's directory-access rate," third-party DA service providers would not be harmed because amounts collected from them would be recorded in a memorandum account and then subject to a true-up, with any excess refunded with interest at the three-month commercial paper rate, once permanent rates were established.[6]

Petitioners now seek a modification of D.98-01-022 to require that within 30 days after the effective date of the order for modification, Pacific and Verizon be required to re-compute charges for DA data previously furnished to third-party DA service providers based on the lowest rate, in effect at the time such data was provided, that they charged any other provider, including without limitation, the ILEC itself, its affiliates, and CLCs, and to refund to third-party DA providers the difference between the re-computed charges and the amounts actually paid by them

The Petitioners claim that the requested modification of D.98-01-022 is warranted because it has now been three years since D.98-01-022 was issued and four years since D.97-01-042 was issued while no resolution of the DA database pricing issue appears on the horizon. In the meantime, Pacific has had full use of the funds paid by Metro One, InfoNXX, and other independent third-party DA service providers pursuant to D.98-01-022 and continues to charge such

[5] D.98-01-022, mimeo., p. 5.

[6] D.98-01-022, mimeo., pp. 5-7.

providers the same tariff rates for DA data. Unless D.98-01-022 is modified, petitioners claim third-party DA service providers will continue to suffer undue economic hardship and be unfairly disadvantaged in the marketplace until such time if ever, that final costs and prices for DA database access are approved.

Petitioners also point to the Directory Listing Order issued by the Federal Communications Commission (FCC) on January 23, 2001[7] in support of their Petition. In the Directory Listing Order, the FCC held that third-party DA service providers who are acting as agents or independent contractors for CLCs, or who provide call completion services, are entitled to receive access to DA database listings under the same rates, terms, and conditions that apply to CLCs. ILECs are also required to file agreements establishing rates, terms, and conditions for DA data basis access pursuant to Section 252 of the 1996 Act and third-party DA service providers meeting the FCC's criteria are entitled to opt into such rates, terms, and conditions.[8] The FCC has not yet determined whether these same rules must be extended to include DA database access afforded to third-party DA service providers who are neither carriers nor acting on behalf of carriers. Nonetheless, Petitioners argue that it is discriminatory not to require that the same rates, terms, and conditions be extended to all DA service providers.

Pacific and Verizon California Inc. (Verizon) filed responses in opposition to the Petition on March 19, 2001. With the approval of the ALJ, Petitioners filed

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[7] *Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended,* CC Docket No. 99-273, First Report and Order, FCC 01-27 (released January 23, 2001).

[8] *Id.* at para. 36.

a third-round reply on March 28, 2001. On June 12, 2001, a draft decision on the petition was mailed to parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules and Practice and Procedure. The draft decision declined to grant the full modification sought by Petitioners, namely to reduce ILEC charges for services furnished to third-party DA providers to a level equal to the lowest rate charged to any other provider. Instead, the draft decision found that a more limited modification in DA rates was warranted. This more limited modification provided for some reduction in DA rates, but not as much as was sought by Petitioners. The draft decision held that Pacific should be required to amend its tariff to exclude the five-cents-per-query charge. Comments on the draft decision were filed on July 2, 2001, and reply comments were filed on July 9, 2001. LSSI Corp. (LSSI)[9] filed separate comments on the draft decision on July 18, 2001.

On June 28, 2001, Pacific filed a motion for permission to file detailed comments on a proposal in the draft decision served on June 12, 2001, regarding the Petition for Modification of D.98-01-022. Pacific argued that although the draft decision proposed to order Pacific to modify its tariffed rate for access to DA listings to remove the five-cents-per-query charge based on the Arbitrator's Report in Pacific's arbitration with AT&T, this holding was not requested as part of the Petition. Pacific argued, therefore, that it had no opportunity to comment on this proposal.

[9] LSSi concurrently filed a motion to enter an appearance and to file comments on the draft decision. LSSi is a switchless reseller of telecommunications services that purchases DA listings from Pacific, and therefore has a continuing material interest in the outcome of this proceeding. No party objects to LSSi's motion to enter an appearance and file comments. Accordingly, the motion is granted.

Pacific, therefore, requested to file detailed comments on the draft decision's proposal to modify Pacific's tariff. Specifically, Pacific sought to brief related findings of this Commission and the Federal Communications Commission (FCC), including the FCC's findings that directory listing information is not an Unbundled Network Element (UNE), and that fair prices for subscriber listings are $.04 for base file listings, and $.06 for updates.

Pursuant to an Administrative Law Judge (ALJ) Ruling issued July 3, 2001, granting Pacific's motion, parties were permitted to file further comments on the issue of whether Pacific should be required to amend its tariffs to exclude the per-query charge from its tariffs. Comments were filed on July 18, 2001. The draft decision was withdrawn from the Commission's agenda pending review of parties' supplemental comments on this issue. A revised draft decision has now been prepared, incorporating a review of parties' further comments filed on July 18. Parties were also provided the opportunity to file comments on revised draft decision.

Pacific claims that the modifications Petitioners have requested are contrary to law. Pacific argues that the FCC did not hold that ILECs must give a DA provider acting as an agent for a CLEC access to DA listing information at the lowest price charged to any other CLC. Instead, the FCC held that the DA provider-agent is entitled to access only at the price contained in its carrier-principal's interconnection agreement. Pacific claims that Petitioner's requested modification to D.98-01-022 is, therefore, contrary to the FCC's January 23 Order, and should be denied. Moreover, Pacific argues that since petitioners are not entitled to the lowest rate charged any other CLC, their request for a refund using such a number as a benchmark is improper, and should be rejected as well.

Pacific also claims it is impossible for the Commission to determine whether Petitioners even fall within the scope of the FCC's January 23 Directory

Listing Order because Petitioners have failed to present any evidence that they are in fact DA provider-agents, that their carrier principals have authorized them to obtain DA listing information on their behalf, or that Petitioners have paid different rate than their carrier-principals.

Both Pacific and Verizon also claim that Petitioners here have failed to comply with Rule 47(b) requiring factual allegations to be supported with citations to the record. For example, Petitioners allege that at some point Pacific "indicated that the rate [for DA access] would be $0.0059 per listing."[10] Later, Petitioners allege that they are "third-party DA service providers who are acting as agents or independent contractors for CLCs."[11] Pacific claims that bare allegations such as these are insufficient to support a petition for modification.

Verizon argues that Petitioners have failed to explain why they waited until over three years after the issuance of D.98-01-022 to file the petition. Rule 47(d) requires that if more than a year has elapsed since the effective date of the decision to be modified, the Petitioner must explain why the petition could not have been brought within one year of the effective date. Ordinarily, petitions allege factual or legal circumstances which have changed since the issuance of the decision and which support the requested modification. Verizon claims, however, that other than the passage of time, Petitioners here allege no such circumstances. Not only have Petitioners waited over three years from the issuance of the decision they seek to modify, but they have waited well over a

[10] Petition for Modification, p. 2. Pacific claims that not only is this allegation unsubstantiated, but is contrary to the prices included in Pacific's advice letter establishing the DALIS tariff.

[11] *Id.*, p. 4.

year after submission of cost studies and commentary in the process intended to set permanent rates to replace the interim rates they now find objectionable.

Verizon also opposes the Petition, arguing that it ignores subsequent events and rulings which have taken place and misapplies existing decisions. Verizon believes D.98-01-022 already provides substantially the same lawful relief that Petitioners seek (i.e., a true up of interim rates). Verizon claims the true up mechanism already provides adequate protection to DA providers and that mere delay does not justify making the changes the Petitioners seek.

III. Discussion

A. Procedural Compliance

We conclude that Petitioners satisfy the procedural requirements of Rule 47 as a basis to have their Petition considered on its merits. Rule 47(d) requires that if a petition is filed more than one year after the effective date of the decision proposed to be modified, petitioners must explain why they couldn't file within the one-year period. Although the Petition was filed over one year after the effective date of D.98-01-022, Petitioners have provided an explanation why the Petition was not filed within that one-year period. As noted in their pleading, Petitioners explain that during that first year, it was not expected that the ultimate duration of delay in adopting final OANAD rates would exceed three years. Also, Petitioners point to the more recent issuance of the FCC Listing Order as having changed the relative positions among competitors, thereby claiming further reason to justify a modification to D.98-01-022.

We also find the Petitioners have met the requirements of Rule 47(b) in terms of providing citations to the record. Although Pacific challenges the accuracy of the DA rate cited by Petitioners, the Petition does nonetheless provide a citation from its filed comments for the claimed rate. To determine

procedural compliance, we need not resolve what the correct rate actually is on a substantive basis. It is enough that we confirm that a citation was provided, albeit subject to challenge on a substantive basis.

Regarding the other disputed allegation, whether Petitioners are DA agents of CLCs, the Petitioners provided a relevant citation in their reply to the opposition of Pacific and Verizon, referencing their filed 1997 comments in this proceeding. In any event, the question of whether the Petitioners are DA agents of CLCs is not directly relevant to the proposed modification sought in their petition. Petitioners expressly state that they are not seeking relief under the federal rules. Therefore, it is not necessary to confirm whether or not the Petitioners are agents of CLCs in order to adjudicate the Petition. We shall therefore proceed to evaluate the petition for modification on its substantive merits.

B. Substantive Merits

Petitioners present two general arguments to support their claim that D.98-01-022 should be modified. First, Petitioners claim the continued passage of time with no final rates has led to a cumulative burden on DA providers that has become excessive. Second, Petitioners claim there are discriminatory effects on DA providers that are not covered by an agent/principal relationship with a CLC as prescribed in the FCC 's Directory Listing Order. We address these arguments below.

1. Interim Arrangement is Not Discriminatory

First, Petitioners point to the continuing passage of time since we first adopted the memorandum accounting requirement in January 1998, arguing that the Commission never anticipated that more than three years would elapse with no final rates in place. We recognize that the continuing passage of time

with no final DA rates in place increases the risk that third-party providers are paying rates that may be overstated. The competitiveness of the marketplace for DA services will best be promoted in an environment where rates are aligned with costs. The ultimate solution to the problem posed by Petitioners will be for the Commission to adopt final rates for DA provisioning based upon cost studies in the OANAD proceeding. We remain committed to conducting these cost study proceedings in the interests of promoting a competitive marketplace for DA services. Unfortunately the Commission's resource constraints have precluded moving forward with proceedings on those cost studies and adoption of final rates for DA services up to the present time. Nonetheless, although we are sympathetic to the general concerns expressed by Petitioners, we find that the remedy proposed by Petitioners is not appropriate for the reasons set forth below. As an alternative to the Petitioners' proposed solution, we shall adopt a more limited pricing adjustment that will provide some measure relief to third-party providers until permanent DA rates can be adopted.

Although the passage of time incrementally increases the potential build-up of funds in the memorandum accounts subject to true up, it does not change the fundamental rationale relied upon at the time that we issued D.98-01-022. We originally adopted the requirement for memorandum accounting of revenues collected under the ILECs tariffed rates for DALIS, subject to true up, to address the uncertainty as to what rates would ultimately be adopted in the OANAD and as to when those rates would be established. By making the rates provisional and subject to true up, we provided protection to DA providers that they would be made whole for any charges that were subsequently determined to be excessive.

When we adopted the memorandum accounting requirement, however, we made no predictions concerning how long the interim rates would

last or when final rates would be adopted. The uncertain duration of the interim arrangement was taken into account in adopting D.98-01-022, and we did not set any time limit on how long the interim arrangement would have to remain in effect. The passage of three years since the arrangement took effect does not change the rationale for continuing the status quo. We do not consider the interim arrangement to be discriminatory because it makes provision for a true up and refund of any overcharges to DA providers once final rates are established in OANAD.

The modification sought by Petitioners would not resolve the uncertainty that continues to exist regarding the ultimate level of rates that will be adopted. In its UNE Remand Order,[12] the FCC relieved ILECs from the obligation to offer DA as a UNE and further ruled that the Act's cost-based UNE pricing standards do not apply to DA. These developments, if anything, create further uncertainty regarding what final levels of DA prices will be set, and how much they will differ from current interim rates. The Petitioners have failed to provide any alternative interim rate that would lessen the uncertainty as to what final rates will be. Therefore, the passage of three years since the issuance of D.98-01-022 does not provide a basis to justify changing interim rates in the manner proposed by Petitioners.

Moreover, the Petitioners' proposed change in the interim rate would not be consistent with the requirements of recent court decisions. Petitioners propose that the ILECs should establish a new interim rate equal to the lowest amounts that were charged to any other provider for DA access,

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[12] *Implementation of the Local Competition Provisions of the Telecommunications Act,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3891-92 (1999) (UNE Remand Order).

including without limitation, an ILEC affiliate or a CLC during any period since January 1997 when the Commission issued D.97-01-042. Yet, such an approach would be inconsistent with recent court decisions interpreting the "pick-and-choose" provisions of interconnection agreements. Under recent court decisions, an ILEC is entitled to require a requesting carrier to accept all terms that are "legitimately related" to the desired term. (AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S.Ct. 721, 738 (1999).) Petitioners' proposed change, however, ignores the requirement to link lower rates to other "legitimately related" terms contained in the pertinent agreements with CLCs prescribing those rates. Instead the Petitioners seeks to obtain the lowest rates offered any provider "without limitation." Therefore, we cannot adopt the proposed modification, since it would remove necessary limitations linking "legitimately related" terms to any rates that might be available to DA providers.

As a second basis underlying their claimed justification for modification, Petitioners point to a purported deficiency in the Federal Listing Order. Petitioners claim the federal order has "left out" competitors that operate on a "stand-alone" basis without an agent-principal relationship with a CLC. Petitioners claim such stand-alone DA providers are not yet able to obtain data under the federal rules applicable to carriers' "agents."

Even assuming that federal rules did not provide sufficient authority for stand-alone DA providers to obtain access to DA data, our own state-adopted rules already mandate that all third-party DA providers must be granted access to DA databases of the ILECs. Our rules have not "left out" any DA providers in their coverage under our rules. We adopted the requirement in D.97-01-042 for all third-party DA providers to be granted access to DA data on a nondiscriminatory basis, and no further modification to a Commission decision is necessary simply to reiterate a requirement that already exists.

Petitioners provide no basis to conclude that our current interim treatment results in unfair discriminatory treatment of DA providers merely because they are not agents of CLCs. As noted above, the FCC Directory Listing Order issued on January 23, 2001 held that a third-party DA provider who acts as an agent for a CLC is entitled to receive access to DA database listings under the same terms contracted by its CLC principal. Petitioners' proposed modification to D.98-01-022 would appear to result in a conflict with the FCC Order in that the Order specifically limited a DA provider's rights to obtain the rate only of its CLC principal. Under the federal rules, a DA provider is not entitled to a lower rate that might be offered to any other DA provider with a different CLC principal. The Petitioners' proposed modification would ignore the relationship between the DA provider and its CLC principal, but instead would enable any DA provider to demand whatever rate was offered to any DA provider or CLEC, irrespective of whether there was any agent-principal relationship or not.

While we are not necessarily prevented by federal rules from adopting additional state rules, if warranted, we need not reach that issue here. Independent of federal rules, we find no basis to conclude that granting the petition is the proper course of action to achieve nondiscriminatory access to DA listings. We have already concluded in D.98-01-022 that the provision for ultimate true-up of interim rates reasonably protects the interests of all parties involved. The changes proposed in the Petition for Modification do not offer an alternative that results in a better balance of interests than the status quo.

Finally, there is no need to modify D.98-01-022 in order for DA agents to avail themselves of the contractual rate provisions of their CLC principal. The federal rules already provide for that. Petitioners have indicated that they are already DA agents of CLCs, and therefore already have rights to the same rate as their CLC principal. Petitioners expressly state they are not seeking

any relief available to them under federal rules through the proposed modification of D.98-01-022. Accordingly, we find no basis justifying a modification of D.98-01-022. The Petition for Modification is therefore denied.

2. Exclusion of Per-Query Charge

Although we do not find justification to modify D.98-01-022 in the manner requested by Petitioners, we do conclude that a more limited revision is justified with respect to the rates charged by Pacific under its DALIS tariff. As a basis for the more limited revision, we take note of the Final Arbitrator's Report in A.00-01-022 in the matter of the interconnection agreement between Pacific and AT&T Communications, Inc. (AT&T).

The Final Arbitrator's Report, issued June 13, 2000, in A.00-01-022 noted that Pacific's DALIS tariff includes two elements: (1) a charge of two cents per listing for each separate listing that Pacific furnishes to the DA provider, plus (2) a charge of five cents per listing each time the provider gives out DA listing information to one of its customers. In the arbitration proceeding, AT&T stated that it had no mechanism in place to track the number of times that it gave out DA information from a listing provided through Pacific's DALIS tariff (which was one of hundreds of databases on which AT&T relied). AT&T stated that it had never paid the five-cents-per-query charge, and that the requirement for such a charge is entirely unworkable in practice. In its comments in the arbitration, Pacific offered nothing to refute AT&T's claim that it did not pay the five-cents-per-query charge. The Arbitrator adopted AT&T's position, excluding the five-cents-per-query charge in setting the amount that AT&T was to pay for access to Pacific's DA listings.

The exclusion of the five-cents-per-query charge in the arbitration was not based upon any offsetting tradeoffs or concessions by AT&T. The exclusion of the five-cent charge was not linked to any other "legitimately

related" terms. Instead, the Arbitrator adopted the exclusion of the per-query charge based simply on the finding that this provision of the tariff was unenforceable.

Not only was AT&T unable to track DA queries that it accessed from Pacific's database listings, but Pacific was likewise found to be unable to enforce compliance based on the number of DA queries made by AT&T's customers from Pacific's database. Similarly, if Pacific is unable to independently enforce the per-query charge in the case of AT&T, there is no reason to believe that Pacific could independently track per-query transactions of all other DA providers utilizing listings under the terms of Pacific's DALIS tariff. Therefore, we conclude that it is not reasonable to continue to include a provision in the DALIS tariff for a five-cents-per-query charge that is not subject to independent tracking or enforcement.

We conclude that a similar rationale as was applied in the case of the AT&T arbitration has general applicability to other users of Pacific's DA listings. Other DA users should likewise be relieved of the obligation to pay the five cents per query charge in view of the unenforceability of Pacific's DALIS tariff provision.

In its comments on the draft decision mailed on July 12, 2001, Pacific expressed objections to the Commission's reliance on the AT&T Arbitration proceeding as a basis to adopt generic rules for all DA providers. Pacific claims that there is no evidence that the facts that were applicable to AT&T are applicable to other telecommunications carriers or to purchasers of DA listings that are not telecommunications carriers. Pacific also argued that it may very well have changed its strategy in the AT&T arbitration had it known that the result would be applied so broadly to all parties that contract with Pacific for DA

listings. Pacific argued that the draft decision's reliance on the Final Arbitrator's Report from the AT&T arbitration was arbitrary and improper.

By ruling dated July 3, 2001, we placed Pacific and other parties on notice of our intention to consider revising DA charges on a generic interim basis to exclude the five-cents-per-query charge as a way to address the concerns raised by Petitioners. In order to determine if there were any valid reasons not to eliminate the per-query charge for other third-party providers, the ruling provided Pacific, as well as other parties, an opportunity to offer comments on this issue.

In its comments on the revised draft decision issued on November 8, 2001, Pacific continues to object to the elimination of the five cents per query charge. Pacific argues that the revised draft decision applies an improper legal standard by placing the burden of proof on Pacific to show why the current practice should be continued, rather than placing the burden on the Petitioners to show why the current practice should be changed.

We have already concluded that the Petitioners did not meet their burden of proof in their proposed modification to D.98-01-022, and did not adopt their proposal for that reason. Nonetheless, Petitioners have met the burden of showing that in view of the passage of time, some form of DA pricing relief is appropriate. We have independently sought comments from all parties on a possible form of interim pricing relief to address Petitioners' concern in a more limited form than what was proposed. By virtue of Commission's soliciting further comments on this issue, Pacific does have the burden of going forward with providing a response to the inquiry posed by the ALJ ruling.

Although Pacific was provided the opportunity by the ALJ ruling to file additional comments arguing why the per-query charge in its DALIS tariffs should not be eliminated for all purchasers of access to its DA database, Pacific

did not present any justification for continuing such per-query charges for purchasers of its DA access. In its further comments filed on July 18, 2001, Pacific presented no information that would indicate that the reasons why the per-query charges were excluded in the AT&T Arbitration would not apply in the case of other third-party DA providers.

Accordingly, we find that the elimination of the per-query charge for all purchasers of Pacific DA listing service as an interim measure is reasonable, and we hereby adopt it.

We shall, therefore, require Pacific to amend its DALIS tariff to remove the five-cents per listing charge payable each time a DA provider gives out DA listing information using Pacific's database. We shall require that to the extent any DA provider may be able to document that it has previously paid Pacific the five-cents-per query charge, that Pacific shall rebate those charges to the DA provider. Documentation in the form of copies of past billing records would be acceptable evidence confirming such charges. On a going forward basis, we shall require that any interim rates paid to Pacific for DA access exclude any charge for access based on the number of customer DA queries that were provided through Pacific's DA database. Because we have no evidence that Verizon imposes any comparable usage charge based on the number of end-user customer DA queries that are made, we shall limit this directive to Pacific's DALIS tariff.

As in the case of AT&T, we have no basis to conclude that other third parties can accurately track DA queries accessed from Pacific's database or that Pacific can enforce compliance based on such queries. Nonetheless, we recognize that there may have been instances where third parties were billed and paid charges under the five-cents-per-query feature of Pacific's tariff. The fact that such charges were billed or paid does not necessarily either confirm or

invalidate the ability of third parties to accurately track DA queries or of Pacific to enforce compliance.

We shall modify D.98-01-022 to require that the provisional rates to be paid under Pacific's DALIS tariff be adjusted to exclude the five-cents-per query charge, and that rebates be made to DA providers to the extent, if any, that they have previously paid charges under this tariff provision. The provisional rates shall remain subject to a further true up once final DA access rates are adopted in the OANAD proceeding. Because the removal of the per-query charge is a straightforward amendment to the tariff, we shall direct Pacific to amend its tariff in this regard as a compliance filing. As such, the removal of the per-query charge shall become effective upon the filing of the advice letter, instead of after the 40-day period that would apply under General Order 96-A.

Although the reduction in DA rates that we adopt in this order does not provide the specific relief requested by Petitioners, it does provide improvement over the previous situation. By limiting DA charges only to the two cents per-listing allowance in Pacific's tariff,[13] competitors for DA listing access will be able to obtain the same rate that was obtained by AT&T, a major CLEC. Thus, DA providers will only have to pay a two cents per listing charge, but can entirely avoid the five-cents-per-query charge that was previously required under Pacific's DALIS tariff. We believe that this lowering of the DA

[13] We take note of Pacific's advice letter filing dated November 21, 2001 seeking to revise its applicable charges under its DALIS tariff. The revisions would eliminate per-query charges and would raise the current rate of base files to the current ceiling of four cents per DA listing, establish six cents per DA listing the ceiling for updates, and raise the current price of updates to the new six cent per DA listing ceiling. To the extent these revised tariff charges subsequently become effective, it would change the amount of charges from that which is currently payable under the DALIS tariff.

rate in this manner will constitute a positive step in the direction of competition for DA services, providing interim relief to DA providers until final DA rates can be determined in the OANAD proceeding.

IV. Pacific's Proposal to Apply Directory Publishing Listing Rates to DA Access

In its comments filed on July 18, 2001, Pacific offered an alternative proposal for adopting final DA access rates now in this proceeding rather than further deferral of the pricing issue to the OANAD proceeding. Pacific proposed that the Commission adopt final rates for the provision of DA listing service equal to the rates found "presumptively reasonable" by the FCC for access to subscriber list information in its "Third Report and Order Regarding the Provision of Directory Listing Information" issued on September 9, 1999.[14] "Subscriber list information" includes listed subscribers' names, addresses and telephone numbers as well as the heading under which businesses are listed in the yellow pages. In its Order, the FCC directed carriers to provide subscriber list information to requesting directory publishers at the "presumptively reasonable" rates of $0.04 per listing for base file information and $0.06 per listing for updated list information. In determining that the $0.04/$0.06 per listing rates were presumptively reasonable rates for access to subscriber list information, the FCC considered both "the directory publishers' interest in

[14] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, 14 FCC Rcd. 15550, FCC 99-227 (rel. Sep. 9, 1999) ("FCC Order").

obtaining subscriber list information at prices that facilitate competition in directory publishing; and the carriers' interest in obtaining fair compensation for their subscriber list information."[15]

Pacific argues that there are similarities inherent in the provision of subscriber list information and DA listing information that make it appropriate for the California Commission to adopt a similar pricing schedule for each. Pacific also points to the FCC's finding that competition exists both in the provision of operator services and directory assistance as a basis to adopt market-based rates.

InfoNXX objects to Pacific's proposal to set rates for DA listings based upon the FCC rates for directory publishers, arguing that such an approach would be inconsistent with state law and policy. InfoNXX notes that the FCC's pricing determination only extends to listings used by directory publishers, but does not extend to listings for DA database access. LSSI also filed comments in opposition to the proposal of Pacific to set DA database access rates equal to the rates that the FCC found "presumptively reasonable" for accessing to listings provided to directory publishers.

We decline to adopt the recommendation of Pacific that the final rates for the provision of DA service be set at the same rates that were found "presumptively reasonable" by the FCC for access to subscriber list information in its Third Report and Order. The FCC has specifically declined to adopt the rate methodology for subscriber list information used for directory publishing as a basis for pricing DA services. The FCC concluded that the pricing structure for DA access services "should remain distinct from that of subscriber list

[15] FCC Order § 84.

information" developed pursuant to the rate methodology set forth in Section 222(e).[16]

As the FCC stated in its DA First Report and Order:

> "Essential to a competitor's ability to provide directory assistance is access to an accurate local directory assistance database. [footnote omitted] Because incumbent LECs derive their local directory assistance database through their service order processes, they continue to maintain a near total control over the vast majority of local directory listings that form a necessary input to the competitive provision of directory assistance…. The directory assistance market will not be fully competitive as long as incumbent LECs have the ability to leverage their monopoly control of their DA databases into market dominance."[17]

Accordingly, in the interest of assuring that DA competitors are not disadvantaged by the ILECs' ability to charge excessive rates for DA access, we decline to apply the rate structure as proposed by Pacific.

Moreover, while it is not precedential, we note that in the Pacific/MCI Arbitration application,[18] Pacific made a pricing proposal that is similar to the one it has offered in this proceeding. Yet, Pacific's proposal was rejected in the Final Arbitrator's Report in that proceeding, noting that the rates for directory publishing cannot be used to justify the rates for DA access because those services are statutorily separate and distinct. Consistent with the distinctions

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[16] *In the Matter of Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended,* CC Docket No. 99-273, First Report and Order, FCC 01-27, § 37 (rel Jan. 23, 2001) ("FCC DA First Report and Order").

[17] *Id.*, § 3.

[18] Application by Pacific Bell Telephone Company for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, LLC (A.01-01-010)

between directory publishing and DA provisioning as made in the FCC's DA First Report and Order, we likewise find no basis here to adopt Pacific's proposal to set DA rates equivalent to those for directory list information provided for published directory service.

The fact that the FCC has determined that DA database access is not an unbundled network element does not preclude this Commission from independently proceeding to establish cost-based rates for DA database access as a matter of state law and policy. In conjunction with its comments filed on July 18, 2001, Pacific submitted confidential cost data under seal relating to its cost of providing DA listings as a reference for evaluating its pricing proposal.[19] Yet, since we have previously indicated that the costs of DA provisioning will be addressed in the OANAD proceeding, no separate phase has been designated in this proceeding as a basis to conduct a cost study of DA provisioning. Accordingly, we make no judgment concerning the reasonableness or reliability of the data presented under seal by Pacific, nor do we have any basis to rely on such data in disposing of the instant petition for modification.

V. Beginning Point for True-Up

Parties indicate conflicting interpretations concerning the point in time when the true up of DA rates is to take effect. We disagree with Verizon that once a true up is ultimately made, it should only apply to revenues collected subsequent to January 1998, the issuance date of D.98-01-042. Verizon claims

[19] Pacific concurrently filed a motion in accordance with Commission General Order 66-C for leave to file under seal certain cost information designated as proprietary included in its comments filed on July 18, 2001. No party objected to Pacific's motion to file the proprietary materials under seal. Accordingly, the motion is granted.

that rates in effect at the time that D.97-01-042 was issued in January 1997 are "presumptively reasonable" and cannot be subject to refund now. Yet, in D.97-01-042, we provided no basis to infer that then-existing DA rates were deemed presumptively reasonable. Instead, we noted that the Association of Directory Publishers (ADP) had raised questions concerning the reasonableness of Pacific's tariffed rate for directory access. We expressly stated that by permitting Pacific's tariff to become effective, we had not ruled out the opportunity for to pursue any remaining reasonableness issues over the tariff. We then provided an opportunity for parties to file comments on this issue. The fact that the actual decision adopting memorandum accounting was not issued until January 1998 did not resolve the reasonableness issues that had previously been raised by ADP. In OP 4, of D.98-01-042, we authorized the memorandum accounts to apply retroactively to the effective date of Pacific's directory access tariffs.

In D.98-06-027, the Commission modified OP 4 of D.98-01-042, to state that memorandum accounts should retroactively reflect revenue billed since the effective date of the 1996 Telecommunications Act rather than the effective date of carriers' tariffs. Pacific further interprets D.98-06-027 as holding that D.98-01-042 was not intended to authorize a retroactive true up. Pacific cites language from OP 4 of D.98-01-042 which states:

> "At the present time, we have simply ordered the establishment of memorandum accounts to record billings to third party vendors…. We have not issued any order regarding rates or the disposition of the money tracked in the accounts."

Pacific claims that nothing in D.98-01-042 authorizes the Commission to apply new rates retroactively. INFONXX disputes Pacific's interpretation, arguing that the ILECs never had the unilateral right to set rates, much less

nonrefundable rates, for DA database access at any time following the date that D.97-01-042 was issued. LSSI likewise argues that Pacific ignores the fact that a true up is the exact function for which the memorandum account was established. LSSI claims that D.98-01-022 effectively provided notice to Pacific that the funds were subject to true up, and that a determination that existing rates are improper and unreasonable appropriately triggers the need for true-up.

We find that the language in D.98-06-027 is clear that DA rates were to be retroactively trued up to the effective date of the Act. The modification made in OP 1 of D.98-06-027 did not delete the language in D.98-01-022 indicating that DA charges would be subject to retroactive true up, but simply revised the starting point for the true up to begin with the effective date of the Act. Nothing in D.98-01-022 otherwise reversed or disturbed our previous findings in D.97-01-042 that the function of the memorandum account was to provide for a retroactive true up once final DA rates were determined. The fact that D.98-06-027 indicated that an order had not yet been issued regarding our disposition of the DA funds did not negate our prior holding in D.98-01-022 that that DA charges would be subject to true up once any such final disposition was made.

Accordingly, Pacific shall be required to perform a true up of the amounts it has previously charged for DA access retroactive to the effective date of the Act, and to rebate DA providers for any overcharges relating to the five-cents per query charge that we disallow pursuant to today's order.

Findings of Fact

1. In D.98-01-022, the Commission required that memorandum accounts be established to track revenues billed for directory access services rendered to third-party competitors in order to permit a later true up and refund of any overcharges once final rates were established in the OANAD proceeding.

2. Almost four years have passed since the memorandum accounting requirement was adopted, and final rates have yet to be adopted in the OANAD proceeding.

3. The original reasons the Commission relied upon as a basis to establish the memorandum accounts and provisional rates have not changed.

4. The passage of almost four years since D.98-01-022 was adopted has not lessened the uncertainty as to what the level of final rates will be or when those rates will be adopted in OANAD.

5. The interim arrangement adopted in D.98-01-022 does not treat DA providers in a discriminatory manner, since provision is made for a true up and refund of any overcharges to DA providers once final rates are established in OANAD.

6. Petitioners' proposed modification to D.98-01-022 ignores the legal requirement to link lower rates to other "legitimately related" terms contained in the pertinent agreements with CLECs prescribing those rates.

7. In OP 4, of D.98-01-042, the Commission expressly authorized the true up of amounts booked in the memorandum accounts to apply retroactively to the effective date of Pacific's directory access tariffs.

8. As noted in the arbitrator's report in A.00-01-022, Pacific's DALIS tariff calls for a charge of five cents per listing each time the provider gives out a listing to one of its customers through its own DA service.

9. As found in the A.00-01-022 arbitration proceeding, AT&T had no mechanism in place to track the number of times that it gave out DA information from a listing provided through Pacific's DALIS tariff.

10. If Pacific is unable to independently enforce the per-query charge in the case of AT&T, there is no reason to believe that Pacific could independently track

per-query transactions of other DA providers utilizing listings under the terms of Pacific's DALIS tariff.

11. It is not reasonable to include a provision in the DALIS tariff for a five-cents-per-query charge that is not subject to independent tracking or enforcement by Pacific.

12. Although Pacific was provided the opportunity to file comments justifying why the per-query charge in its DALIS tariffs should not be eliminated for all purchasers of DA access, Pacific did not do so.

13. The rates found presumptively reasonable by the FCC for purposes of pricing access to ILEC listings for directory publishing vendors are not applicable to the pricing of DA access by third parties.

14. The FCC has concluded that the pricing structure of DA access services should remain distinct from that of subscriber list information developed pursuant to the rate methodology set forth in Section 222(e) of the Act.

15. The FCC has concluded that the ILECs continue to maintain a near total control over the vast majority of local directory listings that form a necessary input to the competitive provision of directory assistance.

16. This proceeding has not been designated as the forum in which costing data related to the provision of DA access is to be adjudicated. Thus, the cost data that Pacific has provided under seal has not been tested nor may it be relied upon as a basis for resolving this petition for modification.

17. The language in D.98-06-027 is clear that DA rates were to be trued up retroactive to the effective date of the 1996 Telecommunications Act.

18. Merely because D.98-06-027 indicated that no order had yet been issued regarding the disposition of DA funds, nothing in that decision negated prior holdings in D.98-01-022 that DA charges would be subject to true up once any such final disposition was made.

19. Nothing in D.97-01-042 indicates that then-existing DA rates were deemed presumptively reasonable, particularly since the decision acknowledged that questions had been raised concerning the reasonableness of Pacific's tariffed rate for directory access.

Conclusions of Law

1. Petitioners have satisfied the procedural requirements of Rule 47 relating to petitions for modification.

2. By making the ILECs' directory access rates provisional in D.98-01-022 and subject to subsequent true up, the Commission provided a reasonable safeguard against third-party DA competitors being subject to unfair discrimination in paying for access to DA databases.

3. Although nearly four years have passed without establishing final rates for DA access, there has been no change in the underlying rationale supporting the memorandum accounts as noted in COL 2 above.

4. D.97-01-042 has already adopted rules requiring that all third-party DA providers be granted access to DA data on a nondiscriminatory basis.

5. In the FCC's January 23, 2001 Order, the FCC held that a third-party DA provider who acts as an agent for a CLC is entitled to receive access to DA database listings under the same terms contracted by its CLC principal.

6. The Petitioners' proposed modification would ignore the relationship between the DA provider and its CLC principal, but instead would permit any DA provider to demand whatever rate was offered to any DA provider or CLC, irrespective of whether or not there was an agent-principal relationship.

7. Setting a new interim rate for all DA providers equal to the lowest amounts that were charged to any other provider for DA access during the period since January 1997 would be inconsistent with recent court decisions interpreting the "pick-and-choose" provisions of interconnection agreements.

8. Under recent court decisions, an ILEC is entitled to require a requesting carrier to accept all terms that are "legitimately related" to the desired term, such as prices paid for DA access.

9. Petitioners claim is not supported that the current interim treatment adopted in D.98-01-022 results in discriminatory treatment to DA providers.

10. There is no need to modify D.98-01-022 in order for DA agents to avail themselves of the contract provisions of their CLC principal since the federal rules already independently provide for that.

11. The true-up of rates provided for in D.98-01-022, as modified by D.98-06-027, was intended to be applied retroactively to the date that the 1996 Telecommunications Act went into effect, rather than the effective date of D.98-01-022.

12. Pacific's DALIS tariff should be amended to remove the five cents per query charge in view of the lack of enforceability of this provision of the tariff.

13. Pacific should be required to rebate previously paid access charges, retroactive to the effective date of the 1996 Telecommunications Act, to the extent any DA provider can document that it has previously paid Pacific the five-cents-per query charge.

14. On a going forward basis, any interim rates paid to Pacific for DA access should exclude any charge for access based on the number of customer DA queries that were provided through Pacific's DA database.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Decision (D.) 98-01-022 filed by Metro One Telecommunications, Inc. and InfoNXX, Inc. is hereby denied in part.

2. A more limited modification to D.98-01-022 shall be made as follows:

   a. The following Conclusion of Law (COL) 7 shall be added following COL 6:

      Pacific's DALIS tariff should be amended to remove the per-listing charge that is applied each time DA listing information is given out to end-use customers using Pacific's database.

3. Within 30 days from the effective date of today's order modifying D.98-01-022, Pacific shall file an amendment to its DALIS tariff in accordance with General Order 96-A to remove the charge that is required each time DA listing information is given out to end-use customers from Pacific's database. The removal of the charge shall be effective upon the filing of the DALIS Tariff Amendment.

4. The interim provisional rates charged by Pacific for DA access on a prospective basis shall exclude any per-listing query charge that would otherwise be payable each time that a DA provider gave out DA listing information using Pacific's DA database. These interim provisional rates shall remain in effect pending the establishment of final DA access rates in the OANAD proceeding, and true up of final billing adjustments based upon the OANAD rates.

5. Pacific shall rebate the per-query listing charge to any DA provider that has previously paid to Pacific retroactive to the effective date of the 1996 Telecommunications Act to the extent any DA provider produces documentation to Pacific of the amount that it has paid for such charges. Documentation in the form of copies of past billing records shall be acceptable evidence confirming the amount of such charges. Pacific shall disburse the rebates to qualifying DA providers within 30 days of receipt of documentation confirming the amount of such charges.

6. Pacific's motion dated July 18, 2001, to file confidential cost data under seal is granted. The material shall remain under seal for two years from the date of this decision unless Pacific files a new motion requesting for good cause to extend the period that the materials remain under seal beyond the two years.

7. The motion of LSSi Corp. to intervene and to become a party is granted.

This order is effective today.

Dated _____, at San Francisco, California.